IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 11

FEDERAL TRADE COMMISSION,
Petitioner,

v.

MINNEAPOLIS-HONEYWELL REGULATOR COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT ON JURISDICTION

ALBERT R. CONNELLY,
Counsel for Respondent,
15 Broad Street,
New York 5, N. Y.

DONALD C. SWATLAND,
WILL FREEMAN,
Of Counsel.

October 8, 1952.

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Judgment Below

The judgment of the Court of Appeals for the Seventh Circuit, entered in favor of respondent (M-H),* on July 5, 1951, and the opinion of the Court of Appeals (reported at 191 F. 2d 786) upon which such judgment was based, appear in the printed transcript of record, respectively, at pages 2316 and 2308-2315. The decree of the Court of Appeals entered on September 18, 1951, in favor of petitioner appears in the printed transcript of record at pages 2316-2319.

*Respondent has filed a separate brief on the merits.

Jurisdiction

In opposing the petition for a writ of certiorari herein, M-H invited the attention of the Court to the matter of the timeliness of the application for a writ. The petition having been filed on December 14, 1951, more than 90 days had elapsed since the entry, on July 5, 1951, of the judgment which, in reality, is the judgment here sought to be reviewed. Accordingly, it was argued that this Court was without jurisdiction under the Judicial Code [Title 28, United States Code, § 2101(c)] to entertain the application.

In its order of March 3, 1952 (342 U. S. 940), in which a writ of certiorari herein was granted, this Court specifically requested counsel to discuss in briefs and on oral argument the question raised as to the timeliness of the application, thereby preserving the issue of jurisdiction for its further consideration.

Statutes Involved

The issue thus raised is to be determined with reference to Sections 1254(1), 2101(c) and 452 of the Judicial Code and Rules 20, 22 and 30 of the Rules of the Court of Appeals for the Seventh Circuit. The relevant portions of those Sections and Rules are as follows:

Section 1254:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

Section 2101:

"(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

Section 452:

". . .

"The continued existence or expiration of a term of court in no way affects the power of the court to do any act or take any proceeding."

Rule 20:

"*Opinions of the court.*—All opinions released by the court shall, on the same day, be handed to the Clerk to be filed, and a copy thereof mailed to counsel for each party. In all cases except that of a decree enforcing the order of an administrative tribunal, judgment shall be entered on the date the opinion is filed."

Rule 22:

"*Rehearing.*—Printed petition for rehearing may be filed within 15 days after entry of judgment. Three copies of such petition shall be served forthwith by the clerk of this court upon the opposing party, who within 10 days from such service may file a printed answer, three copies of which shall be served on the opposing party, and the petition shall be determined without oral argument unless otherwise ordered. Thirty copies of such petition and answer shall be filed with the clerk of this court."

Rule 30:

> *"Decrees enforcing orders of administrative tribunals.*—When an opinion of this court is filed directing the entry of a decree enforcing the order of an administrative agency, board or commission, the agency, board or commission concerned shall within ten days serve upon the adverse party and file with the clerk of this court a proposed decree in conformity with the opinion. If the adverse party objects to the proposed decree as not being in conformity with the opinion, he shall within five days after receiving a copy of the decree proposed, serve upon the agency, board or commission concerned and file with the clerk of this court a suggested decree deemed to be in conformity with the opinion. The court will thereupon settle and enter the decree without further hearing or argument."

Question Presented

Was the time of petitioner within which to apply for a writ of certiorari extended as to the issue fully and finally determined by the judgment of July 5, 1951, merely because the Court of Appeals later entered a decree which incidentally reiterated its July 5 judgment, but which was admittedly entered for the sole purpose of formally disposing of certain totally unrelated issues not now, or even then, in controversy?

Summary of Argument

The only contested issue before the Court of Appeals related to Part III of the Federal Trade Commission order. That issue, involving allegations of unlawful price discrimi-

nation under the Robinson-Patman Act, was fully and finally decided on July 5, 1951, when the Court of Appeals handed down its opinion reversing Part III of the order and dismissing Count III of the complaint. On the same day, pursuant to Rule 20 of the Court of Appeals Rules, judgment was entered in accordance with such opinion.

The judgment so entered made complete disposition of the only issue of which review is now sought.

On September 18, 1951, a further decree was entered by the Court of Appeals at the request of the Commission. Although that decree incidentally reiterated the July 5 judgment, its only purpose, even as argued by the Commission, was to affirm and enforce Parts I and II of the Commission's order (involving alleged violations of the Federal Trade Commission Act and of the "tying clause" provisions of the Clayton Act). The Commission specifically did not seek any further action as to Part III, which it recognized as having been finally disposed of by the July 5 judgment. Since M-H two years before had expressly abandoned its contest of Parts I and II of the order, the entry of a decree thereon was at best only a formality. In any event the decree so entered did not modify, and did not purport to modify, the July 5 judgment.*

After entry of the July 5 judgment, which finally determined the only contested issue before the Court of Appeals, the Commission had 90 days within which to seek a review by this Court [Title 28, United States Code, §2101(c)], and that period was not enlarged by the subsequent decree entered solely to dispose formally of certain unrelated and

*There is no difference in substance between the July 5 judgment as originally entered and as subsequently reiterated as part of the September 18 decree.

uncontested matters presented in the same litigation. *Toledo Scale Company* v. *Computing Scale Company*, 261 U. S. 399, 418 (1923); *Department of Banking* v. *Pink*, 317 U. S. 264 (1942); see also *Dickinson* v. *Petroleum Conversion Corporation*, 338 U. S. 507 (1950). Since the petition for a writ of certiorari was not filed until December 14, 1951, this Court is without jurisdiction to consider the decision of the Court of Appeals as to Part III of the Commission's order. To continue the allowance of a writ of certiorari under such circumstances would be to nullify the clear meaning of the statute.

The application for review having been untimely, the writ should be dismissed.

Statement of the Facts

The Complaint. The proceeding before the Commission was instituted by the service upon M-H of a complaint dated February 23, 1943 (R. 2-11). Such complaint was in three counts, and it is important to note—as the Commission does in its brief (p. 5)—that the several counts against M-H are separate and distinct, each involving a different statute, different charges, different evidence and different cease and desist provisions. Thus, Count I of the complaint, charging violation of Section 5 of the Federal Trade Commission Act, alleged that M-H had misused certain patents of which it was the owner or under which it was an exclusive licensee. Various other allegations of Count I relating to certain exclusive dealing contracts entered into by M-H and its customers were restated in Count II as being violative of Section 3 of the Clayton Act. Count III, on the other hand, alleged violation of Section 2(a) of the

Clayton Act, as amended by the Robinson-Patman Act, and was concerned only with discriminations in price which the Commission alleged to be unlawful under that Act, as amended. It is perfectly evident that the charge under Count III alleging unlawful price discrimination was totally unrelated to, and had nothing whatsoever to do with, the charges under Counts I and II of the complaint.

The Decisions Below. On February 21, 1946, at the conclusion of extended hearings, the Trial Examiner filed his report recommending that a cease and desist order be issued as to Counts I and II but that the charges under Count III be dismissed (R. 2166-2203). On January 14, 1948, after the matter had been briefed and argued before the Commission, an order to cease and desist was issued with respect to all three Counts, that order being divided into Parts I, II and III to correspond with the three Counts of the complaint (R. 2262-2265). In making that order, the majority of the Commission, one commissioner dissenting, declined to follow the recommendation of the Trial Examiner that Count III be dismissed (R. 2265-2282).

Contest of Parts I and II abandoned by M-H. On March 11, 1948, M-H filed in the Court of Appeals for the Seventh Circuit its petition to review the Commission's order (R. 2283-2289). However, to the extent that it sought review of Parts I and II of the order, such petition was expressly abandoned by M-H in its brief filed in the Court of Appeals on July 18, 1949, in which M-H advised the Court that Parts I and II of the order were no longer challenged and that *its argument in support of the petition would be addressed only to Part III.* As was specifically stated in that brief (p. 1):

> "The remainder of the Order is not here challenged."

Indeed, the absence of any issue as to Parts I and II was clearly recognized by the Commision in its brief filed on December 13, 1949, in which it stated (p. 27):

> "... All of the alleged errors relating to the Commission's findings as to the facts and its order to cease and desist made under Count I and Count II of the complaint have been abandoned by petitioner, and in its brief petitioner argues only as to the alleged errors relating to the Commission's findings and order entered under Count III of the complaint."

No argument with respect to Parts I and II of the order was ever made to the Court of Appeals either by M-H or by the Commission in any later briefs or on oral argument of the cause.*

The July 5 Judgment. On July 5, 1951, the Court of Appeals rendered its opinion (R. 2308-2315). After stating that the Commission's order was in three parts, the opinion continues (R. 2308):

> "... Since M-H does not challenge Parts I and II of the order based on the first two counts of the complaint we shall make no further reference to them."

The only issue then remaining for decision related to Part III of the order, and as to that issue the Court of Appeals unanimously held that the Commission must be reversed, saying (R. 2315):

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*The Court of Appeals, on January 21, 1950, deferred oral argument until after the decision by this Court in *Standard Oil Company* v. *Federal Trade Commission* (No. 1, October Term, 1950). After that decision had been handed down [340 U. S. 231 (1951)], the parties filed new briefs. In its substitute brief of March 15, 1951, M-H again declared (p. 1) that it did not challenge Parts I and II of the order.

> "Part III of the order must be reversed and Count III of the complaint upon which it is based, dismissed. It is so ordered."

Copies of the opinion were mailed to counsel for the parties on the day the opinion was filed.

Also on July 5, 1951, pursuant to Rule 20 of the Court of Appeals Rules, judgment was entered in accordance with the Court's opinion of that day. The complete text of such judgment is (R. 2316):

> "This cause came on to be heard on the transcript of the record from the Federal Trade Commission and was argued by counsel.
>
> "On consideration whereof, it is ordered and adjudged by this Court that Part III of the decision of the Federal Trade Commission entered in this cause on January 14, 1948, be, and the same is hereby, Reversed, and Count III of the Complaint upon which it is based be, and the same is hereby Dismissed."

On August 6, 1951, a certified copy of the judgment was sent to the Commission, in lieu of mandate, the forwarding letter stating:

> "Enclosed herewith please find a certified copy of the decree of this Court entered in this cause on July 5, 1951.
>
> "Kindly acknowledge receipt of the same and oblige.
>
> Yours truly,
>
> [/s/ W. P. McCary]
> Deputy Clerk"

The Commission replied on August 8, 1951, as follows:

> "Receipt is acknowledged of your letter of August 6, 1951, enclosing certified copy of the decree entered in the above entitled matter on July 5, 1951.
>
> Very truly yours,
>
> (Signed) D. C. Daniel
> D. C. Daniel,
> Secretary."

A certified copy of each of such letters has been filed with the Clerk of this Court.

The September 18 decree. On August 21, 1951, the Commission presented to the Court of Appeals a memorandum* in support of a proposed decree which it sought to have entered affirming and enforcing Parts I and II of its order. That memorandum, after stating at the outset (par. 1) that Part III had already been disposed of by the July 5 judgment, went on to point out:

> (a) that Parts I and II of the order were unrelated to Part III (par. 2);
>
> (b) that M-H had previously abandoned its contest of Parts I and II (par. 11); and
>
> (c) that the Commission was accordingly entitled to a decree affirming and enforcing Parts I and II (par. 14).

Although the proposed decree accompanying the memorandum contained a reiteration of the July 5 judgment as to Part III, it is perfectly evident that the only relief sought

*Petitioner states in its brief (p. 37, fn. 24) that a copy of such memorandum has been filed with the Clerk of this Court.

by the Commission in requesting entry of the September 18 decree was the affirmance and enforcement of Parts I and II. The memorandum itself makes that fact entirely clear (pp. 1, 4 and 8):

> "*On July 5, 1951, the Court entered its opinion and judgment reversing Part III of the decision* of the Federal Trade Commission dated June 14, 1948, and dismissing Count III of the complaint on which it is based. No disposition has been made of the Cross-Petition filed by the Commission for affirmance and enforcement of the entire decision. . . .
>
> ". . .
>
> "11. In its briefs filed herein the petitioner abandoned its attack upon Parts I and II of the order and challenged only the validity of Part III of the order (see page 1 of petitioner's brief dated March 15, 1951). Thus, petitioner concedes the validity of Parts I and II of the order and does not contest the prayer of the Commission's Cross-Petition and brief with respect to the affirmance and enforcement of Parts I and II of the order.
>
> ". . .
>
> "14. In conclusion, it is submitted that *the Court should make and enter herein a decree affirming and enforcing Parts I and II* of the Commission's order to cease and desist." [Emphasis supplied.]

On September 18, 1951, the Court of Appeals entered the form of decree proposed by the Commission (R. 2316-2319). On December 14, 1951, the Solicitor General filed a petition for certiorari on behalf of the Commission. However, the only issue which that petition presented to this Court for review, *i.e.*, whether Part III of the Commission's order should have been reversed, was adjudicated

with finality by the judgment of the Court of Appeals entered on July 5, 1951.

ARGUMENT

1. An application for a writ of certiorari is untimely if made more than 90 days after entry of the judgment sought to be reviewed.

This Court has time and again held that it does not have jurisdiction to entertain an untimely petition for a writ of certiorari. *Hope Basket Company* v. *Product Advancement Corporation*, 342 U. S. 833 (1951) (petition 91 days after judgment); *Department of Banking* v. *Pink*, 317 U. S. 264 (1942) (petition 124 days after judgment sought to be reviewed). The statute itself [Title 28, United States Code, § 2101(c)] requires that application be made "within ninety days after entry of such judgment or decree".

In the present case the Commission waited from July 5, 1951, to December 14, 1951, before filing its petition for a writ of certiorari—a span of 162 days. The application was, therefore, untimely.

2. The issue here sought to be reviewed was decided by the July 5 judgment and was not affected by the September 18 decree.

The regularity of the July 5 judgment and the finality of its adjudication are not open to question. The judgment was entered on the day the opinion upon which it was based was filed, all pursuant to the applicable provisions of the Court of Appeals Rules (see Rule 20, *supra* at p. 3). Copies of the opinion and judgment were sent to the Commission

and were accepted without protest of any sort. The judgment was not interlocutory in nature, as is apparent on its face, and when read in connection with the opinion pursuant to which it was entered, it compels the conclusion that the Court of Appeals intended thereby to make final disposition of the issue before it. Its purpose and effect were to bring about a complete and unambiguous disposition of Part III of the Commission's order.

The Court of Appeals was never asked by the Commission to alter the July 5 judgment. The fact is, of course, that the Court of Appeals did not alter it.

The proceedings subsequent to the entry of the July 5 judgment were concerned solely with Parts I and II of the Commission's order, the contest of which had long since been abandoned by M-H and as to which the Court of Appeals had made no adjudication. Those proceedings did not affect, nor were they calculated to affect, the finality of the judgment already entered as to Part III. Indeed, they were addressed to parts of the Commission's order which bore no relation at all to its Part III. Those proceedings, which were concerned only with affirmance and enforcement of Parts I and II, did not seek a rehearing* or any modification of the adverse judgment already entered.

It is, therefore, clear that the issue between the parties as to Part III of the Commission's order was disposed of with reviewable finality on July 5, 1951, when the judgment of that date was entered. That is the judgment which, in

*Clearly the memorandum filed by the Commission in support of the entry of a decree affirming and enforcing Parts I and II of the order could not be characterized as a petition for rehearing of the July 5 judgment, which it expressly recognized as dispositive of Part III. The memorandum by its terms limited the relief sought to matters in no way related to the judgment theretofore entered.

reality, is sought to be brought before this Court under the statute [Title 28, United States Code, § 2101(c)]. The time within which to apply for a writ of certiorari to review that judgment commenced to run on the date on which it was entered.

3. The September 18 decree did not start a new period within which to apply for a writ of certiorari as to the issue decided by the July 5 judgment.

If the Commission is correct in its position that entry of the September 18 decree started a new 90-day period within which to seek review of the July 5 judgment, the fixed period of limitation contemplated by Section 2101 (c) would become a completely indefinite period. The only prerequisites for extending the statutory period would be for counsel to develop a plausible reason why some matter—regardless of how unrelated to the real issues between the parties—should be added to what had already been decided and to have an additional decree entered covering the new matter and reiterating the original judgment.

Indeed, this process would not even be limited by the term of the Court of Appeals. Section 452 of the Judicial Code provides (Title 28, United States Code, § 452):

> "The continued existence or expiration of a term of court in no way affects the power of the court to do any act or take any proceeding."

Thus, the September 18, 1951, decree could just as well have been entered in 1952, or 1953, so far as the facts of this case are concerned. Section 452 would permit such entry. If the Commission is correct in its position that a decree like the

September 18 decree starts a new 90-day period, then the time within which to apply for a writ of certiorari as to the July 5 judgment would never come to an end.

4. This Court has consistently held that the reiteration of a final judgment in connection with additional matter not affecting the finality of the original judgment does not start a new period within which to apply for certiorari.

With the entry on July 5, 1951, of a judgment disposing of Part III of the Commission's order, the Court of Appeals disposed of the only contested issue in the litigation. The mere fact that such judgment was later reiterated in connection with the disposition of other uncontested issues involved in the action does not enlarge the time within which to seek a review thereof. *Department of Banking* v. *Pink*, 317 U. S. 264 (1942); *Toledo Scale Company* v. *Computing Scale Company*, 261 U. S. 399 (1923); see also *Dickinson* v. *Petroleum Conversion Corporation*, 338 U. S. 507 (1950).

In the *Pink* case the New York Court of Appeals had entered a judgment affirming an order of the New York Supreme Court, and the remittitur thereon had issued on the same day. Thereafter, a motion was filed in the Court of Appeals to amend the remittitur to recite that a federal question had been presented and decided. The Court of Appeals granted that motion, and the remittitur was modified accordingly. A petition for certiorari, filed within three months after the second remittitur but more than three months after the first remittitur, was held untimely. In its opinion this Court stated (317 U. S. at 266):

> "Under the three-months limitation imposed by the statute, 28 USC § 350, the petition for certiorari

> is timely only if the amendment of the remittitur extended the time within which to apply for certiorari. We are unable to conclude that it had such effect. *Unlike a motion for reargument or rehearing, it did not seek to have the Court of Appeals reconsider any question decided in the case. The final judgment already rendered was not challenged*; what was sought was merely the court's certification that a federal question had been presented to it for decision, and this could have no different effect on the finality of the judgment than a like amendment of the court's opinion." [Emphasis supplied.]

The factual parallelism between the issue here before the Court and that resolved per curiam in the *Pink* case is obvious. The application of the Commission to enter the September 18 decree did not seek reconsideration in any way of the issue resolved by the Court of Appeals in its July 5 judgment, which was the only issue contested by the parties. The September 18 decree in no way altered that judgment. It merely added provisions relating to Parts I and II of the Commission's order, which were not challenged by M-H and which had not been in controversy since M-H abandoned its petition to review those Parts two years before.

In *Toledo Scale Company* v. *Computing Scale Company*, 261 U. S. 399 (1923), an adverse judgment in a patent infringement suit had been entered against the Toledo Company and affirmed by the Court of Appeals for the Seventh Circuit [279 Fed. 648 (1921)]. A timely petition for certiorari had been denied [257 U. S. 657 (1922)]. Thereafter, the Computing Company applied to the Court of Appeals for a further decree against the Toledo Company enjoining the continuance of certain other litigation calculated

to defeat enforcement of the judgment already obtained. The Court of Appeals thereupon entered a further decree which adhered to its affirmance of the earlier judgment but which contained additional provisions designed to give the complete relief that had been sought. A second petition for certiorari, filed more than 90 days after the entry of the first decree but within 90 days after the entry of the second decree, was granted by this Court. *In deciding the case, however, this Court expressly limited its review to the additional matter added by the new decree.* In doing so, this Court made it clear that the reason for thus limiting the scope of its decision was the jurisdictional statute, not the fact that a previous petition had been denied. In its opinion, the Court said (261 U. S. at 417-18):

> "It is insisted by counsel for the petitioner that it is within our power, and it is our duty on this writ to go into the merits of the issue of the validity of the Smith patent and of the correctness of the money decree for profits. We were asked to do this by an application for writ of certiorari which we denied January 9, 1922. 257 U. S. 657. The decree then sought to be reviewed was entered in October, 1921. The application for this second writ of certiorari which we are now considering was not made until May 22, 1922, more than three months after the final decree in the circuit court of appeals for the payment of profits. Section 6 of the Act of September 6, 1916 . . . directs:
>
> > " 'That no writ of error, appeal, or writ of certiorari intended to bring up any cause for review by the Supreme Court shall be allowed or entertained unless duly applied for within three months after entry of the judgment or decree complained of.'

> *"This deprives us of jurisdiction to consider the merits of the decree of October, 1921..*
>
> "... In the case before us, the decree of October, 1921, which we declined to review in January, 1922, *was a final decree, and we are expressly denied power to review it after three months."* [Emphasis supplied.]

It is also important to note that after this Court had rendered its unanimous opinion in the *Toledo* case, a petition for rehearing was filed addressed in part to the ruling on the timeliness question. It was there argued that this Court had overlooked the fact that the October 1921 decree "was amended by the Court of Appeals and reentered at the same term of Court, on March 25, 1922."* That argument, which is identical with the one urged by petitioner in the present case, was rejected by this Court in the *Toledo* case on May 21, 1923. See Supreme Court Docket for No. 339, October Term, 1922, showing rehearing denied.

In *Dickinson* v. *Petroleum Conversion Corporation*, 338 U. S. 507 (1950), the Petroleum Corporation and certain of its stockholders, as intervenors, asserted claims against two individuals. After trial, the District Court dismissed certain claims of the Corporation, holding in effect that the intervenors as a class were entitled to enforce such claims. That judgment, from which the Petroleum Corporation took no appeal, was entered April 10, 1947, and reserved for future determination the respective rights of the individual participants in the class who were entitled to share in the recovery. Thereafter, on August 3,

*See p. 3, petition for rehearing in No. 339, October Term, 1922, received in the Office of the Clerk of the United States Supreme Court on May 8, 1923.

1948, the court, having made such determination, entered a "Final Decree", which disposed of the issues reserved in the 1947 decree and recited that, those issues having been determined by the court, "the said [1947] decree is hereby made final".* The 1948 decree did not make any adjudication of any issue involving the Corporation or otherwise change the 1947 decree as to it. On September 1, 1948, the Petroleum Corporation's receiver in bankruptcy sought to appeal from "so much of this 1948 decree as dismissed" the Corporation's claims. A motion to dismiss the appeal was denied by the Court of Appeals, but this Court on certiorari reversed, holding that the time within which the Corporation might appeal from the 1947 decree was not enlarged by the subsequent entry of the 1948 decree. This Court pointed out that the 1948 decree did not make any change, so far as concerned the Corporation, in the 1947 decree, and adjudicated only other issues which had been reserved for future determination, saying with reference to such additional issues (338 U. S. at 515-16):

> ". . . The court obviously selected with deliberation the issues it would close by the decree and those it would reserve for future decision. If it had any purpose to leave open any issue concerning Petroleum's contentions, or affecting its interests, half a line in the decree would have done so. But that half-line was not written.
>
> "We hold the decree of April 10, 1947, to have been a final one as to Petroleum and one from which it could have appealed and that its failure to appeal

*Compare the emphasis placed by petitioner on the caption "Final Decree" contained in the September 18 decree in the instant case (Br., pp. 1, 27, 34, 37, 38, 47).

therefrom forfeits its right of review. *Its attempt to review the earlier decree by appealing from the later one is ineffective, and its appeal should be dismissed.*" [Emphasis supplied.]

5. None of petitioner's arguments supports its contention that its application for a writ of certiorari was timely.

Petitioner nowhere seriously disputes the fact that the July 5 judgment settled with reviewable finality the issue as to Part III of the Commission's order; nor does it dispute the fact that a lapse of 90 days, without more, would have terminated its right to apply for a writ of certiorari to bring that judgment before this Court.

Petitioner argues (Br., pp. 46-47), however, that its time within which to apply for a review of the judgment dismissing Part III of its order should not be computed from the date of entry of that judgment because at that time it was open to the Commission to apply to the Court below for a decree affirming and enforcing Parts I and II of its order, and, therefore, that a timely application for a writ of certiorari to review the July 5 judgment would have involved the possibility of multiple review proceedings. Thus it suggests that a review might have been sought by the Commission if affirmance and enforcement of Parts I and II had been denied or by M-H if affirmance and enforcement were decreed. Such a suggestion is, of course, completely unrealistic in view of the fact that for over two years there had been no dispute at all as to the form or substance of Parts I and II of the Commission's order. But even if there had been a real possibility that either party would seek review of the decree entered with respect to Parts I and II, such possibility would not have affected the right of the

Commission to apply for review of the judgment reversing Part III; for this Court has held that successive applications for writs of certiorari to review successive judgments on unrelated issues in the same case are entirely proper. *Toledo Scale Company* v. *Computing Scale Company, supra,* 261 U. S. 399 (1923).

Furthermore, the only authority to which petitioner refers in support of its argument are certain general statements about review procedure contained in the opinions of this Court in *Dickinson* v. *Petroleum Conversion Corporation,* 338 U. S. 507 (1950), discussed *supra* at pp. 18-20, and *Cohen* v. *Beneficial Industrial Loan Corporation,* 337 U. S. 541 (1949). Each of those cases, however, is a flat holding by this Court that the reviewable finality of a judgment determining claims of right (like the July 5 judgment here) is not affected by a subsequent decree adjudicating other issues in the same case. Indeed, those cases expressly hold that the time within which to seek review of such earlier judgment is not enlarged by the entry of a subsequent decree.

Recognizing that its petition must be dismissed if it cannot show that the reviewable finality of the July 5 adjudication was affected by the subsequent proceedings, petitioner argues (Br., pp. 37-39) that the Court of Appeals intended the September 18 decree to be its "final decree," superseding the July 5 judgment as to the issue involved in Part III of the Commission's order.

As we have seen, this argument cannot mean that the Court of Appeals on July 5 did not regard its judgment then entered as a final adjudication of that issue. The fact that the Court of Appeals did not immediately enter a decree as to Parts I and II must mean either that the Court did not deem the entry of such a decree of any importance in the light of M-H's abandonment of its contest as to Parts

I and II, or that the Court desired to reserve its final disposition of the uncontested issues involved in those Parts until such time, if ever, as the Commission might decide to submit a formal decree of affirmance and enforcement. That the Court did not immediately dispose of Parts I and II did not, of course, affect the reviewable finality of its judgment entered after careful deliberation as to Part III (the only contested issue)—nor was it so intended.

As we have pointed out under Point 2 (*supra* at pp. 12-14), the instant case is one where the initial judgment of the Court below compels the conclusion that the Court intended thereby to make final disposition of the contested issue before it. The cases cited by petitioner involving mere docket entries followed by formal judgments are, therefore, quite beside the point, being cases where the earlier act of the lower court was demonstrably not intended to be its final judgment.* Nor is petitioner helped by cases in which the earlier act of the court might have been its judgment but for the entry of a second judgment covering only the same ground as the first entry and having no purpose at all unless intended to serve as the court's final judgment with respect to the matters dealt with in the earlier entry.** Such cases are wholly inapplicable to the instant case, since the avowed and only purpose of the September 18 decree was to dispose of additional matters not even considered in the July 5 judgment. We do not believe that petitioner itself takes any stock in the suggestion (Br., p. 38) that the September 18 decree would be only "an empty form" unless the Court of

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United States v. *Hark*, 320 U. S. 531 (1944); *Hill* v. *Hawes*, 320 U. S. 520 (1944); *Monarch Brewing Co.* v. *George J. Meyer Mfg. Co.*, 130 F. 2d 582 (9th Cir. 1942).

**United States* v. *Hark*, 320 U. S. 531 (1931); *Union Guardian Trust Co.* v. *Jastromb*, 47 F. 2d 689 (6th Cir. 1931).

Appeals intended it rather than the July 5 judgment to be dispositive as to Part III of the Commission's order.

However that may be, petitioner goes on to argue (Br., pp. 39-41) that the Court of Appeals, merely because of the entry of the September 18 decree, intended that decree to be its final disposition of Part III for purposes of review, even though the Court up to that time had regarded its July 5 judgment as finally determining the issue raised by Part III. That argument is, of course, based entirely upon the assumption that the Court of Appeals intended its September 18 decree in some way to affect the finality of its July 5 judgment. But, since the Court had been careful to point out in its opinion the absence of any contest over the substance or form of Parts I and II of the Commission's order, the entry of a subsequent decree affirming and enforcing those Parts, being at best only a formality, could not possibly indicate an intention to alter the finality of a judgment entered with the admitted purpose of disposing once and for all of the only contest issue in the case, *i.e.*, the propriety of Part III of the Commission's order.

Petitioner's argument that its application for certiorari in this case is timely is manifestly not advanced by reference (Br., pp. 42, 43) to cases* holding that when the adjudication sought to be reviewed has been altered by amendment or modification of a judgment, the time within which an appeal may be taken runs from the date of the amendment or modification. There simply has not been any such amendment or modification in the instant case.

**Zimmern* v. *United States*, 298 U. S. 167 (1936); *Memphis* v. *Brown*, 94 U. S. 715 (1876); *Rubber Co.* v. *Goodyear*, 6 Wall. 153 (U. S. 1867); *Fultz* v. *Laird*, 24 F. 2d 172 (6th Cir. 1928); *Hewey* v. *Andrews*, 82 Ore. 448, 159 P. 1149 (1916); *Luck* v. *Hopkins*, 92 Tex. 426, 49 S. W. 360 (1899); *Billson* v. *Lardner*, 67 Minn. 35, 69 N. W. 477 (1896).

Equally beside the point are the numerous cases* cited by petitioner (Br., p. 45) which hold that the time to appeal is extended by a timely motion for reargument or to modify the judgment sought to be reviewed. In each of such cases the motion in question *did* seek reargument or rehearing, *did* request the Court to change its previously arrived-at legal conclusions, *did* seek the reconsideration of controverted questions contested in the case or *did* request the addition to the judgment of new matter relating to and directly affecting the finality of the original judgment. Thus in the *Leishman* case petitioner's motion requesting amended findings, when entertained by the Court, was held to have extended the time to appeal because (318 U. S. at 205):

> ". . . The motion was not addressed to mere matters of form but raised questions of substance *since it sought reconsideration of certain basic findings of fact and the alteration of the conclusions of the court. In short the necessary effect was to ask that rights already adjudicated be altered.* Consequently it deprived the judgment of that finality which is essential to appealability." [Emphasis supplied.]

Obviously such cases are no authority at all for an enlargement of time within which to seek review, since petitioner did not seek reargument or rehearing, did not challenge the correctness of the Court's earlier disposition of

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**Johnson* v. *Eisentrager*, 339 U. S. 763 (1950); *United States* v. *Crescent Amusement Co.*, 323 U. S. 173 (1944); *Leishman* v. *Associated Electric Co.*, 318 U. S. 203 (1943); *Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144 (1942); *Bowman* v. *Loperena*, 311 U. S. 262 (1940); *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 300 U. S. 131 (1937); *Gypsy Oil Co.* v. *Escoe*, 275 U. S. 498 (1927); *Voorhees* v. *John T. Noye Mfg. Co.*, 151 U. S. 135 (1894); *Reconstruction Finance Corp.* v. *Mouat*, 184 F. 2d 44 (9th Cir. 1950).

the case and sought in the subsequent decree the disposition only of unrelated and uncontested issues.

Petitioner states (Br., p. 45) that the cases indicate that a petition for rehearing "extends the time to appeal with respect to all parts of a judgment, not merely the portion which the petition or motion seeks to have modified". While that statement may be true, it is without significance here; for there was no petition for rehearing in this case with respect to any part of the July 5 judgment. Petitioner did not at any time, either before or after the 15-day period allowed by Rule 22 of the Rules of the Court below for petitions for rehearing, seek from the Court below any alteration of the rights adjudicated by the July 5 judgment. Accordingly, petitioner's time within which to apply for certiorari to review that judgment is not affected by considerations applicable to petitions for rehearing.

Petitioner is, in the end, reduced to arguing (Br., p. 41) that the entry of a second judgment which adjudicates wholly different, unrelated issues and incidentally reiterates, without change, an earlier judgment that finally settled other issues, supersedes the earlier judgment for purposes of review. This argument of petitioner parallels the one made to this Court in the petition for rehearing in *Toledo Scale Company* v. *Computing Scale Company*, 261 U. S. 399 (1923), rehearing denied, Supreme Court Docket No. 399, October Term, 1922 (*supra* at pp. 16-18). The argument in the *Toledo* case is repeated here almost without change. Aside from the fact that this Court rejected the argument in the *Toledo* case, the authorities referred to by petitoner*

**Zimmern* v. *United States*, 298 U. S. 167 (1936); *Memphis* v. *Brown*, 94 U. S. 715 (1876); *Rubber Co.* v. *Goodyear*, 6 Wall. 153 (U. S. 1867); *Union Guardian Trust Co.* v. *Jastromb*, 47 F. 2d 689 (6th Cir. 1931).

simply do not support the proposition for which they a cited. Thus in *Memphis* v. *Brown*, 94 U. S. 715 (1876 this Court expressly pointed out that the substantial chang effected by the second judgment was the crucial fact whi accounted for treating the earlier judgment as having be superseded (94 U. S. at 717):

> "We think that the order made by the Circu Court, May 20, 1876, upon the motion to subje merchants' capital to the tax was such a final judg ment as may be brought here for reexamination b a writ of error. *The precise question decided by th order had never before been presented in the caus The city was then for the first time required, in e press terms, to subject this particular class of pro erty to the adjudged taxation.* The writ was, ther fore, properly sued out upon the judgment." [Em phasis supplied.]

Petitioner, in arguing that its petition in this case timely, overlooks certain obvious truths:

First: The Commission did not have to wait until th September 18 decree was entered to seek a review of th July 5 judgment. It would not have been hampered i any way in applying for a writ of certiorari to review th July 5 judgment if the September 18 decree had neve been entered.

Second: M-H was entitled to believe on October 4 (9 days after entry of the July 5 judgment) that the proceed ings with respect to Part III of the Commission's orde were at an end. *Matton Steamboat Co.* v. *Murphy*, 31 U. S. 412 (1943). The *Matton Steamboat Co.* case is cite by petitioner itself (Br., p. 47) for the proposition tha

the purpose of statutes limiting the period for review is to "set a definite time beyond which prospective appellees may know, if no appeal has been filed, that the litigation is over."

Third: If the September 18 decree had been intended to supersede the July 5 judgment for purposes of review, without otherwise making any change relating to the issues thereby determined and which are the only issues sought to be reviewed in this Court, the action of the Court of Appeals would have been a flagrant violation of the established rule that a judge or court may not enlarge the time for review beyond the period prescribed by statute. See *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 300 U. S. 131 (1937); *Credit Company* v. *Arkansas Central Railway Co.*, 128 U. S. 258 (1888).

Conclusion

The writ of certiorari should be dismissed for want of jurisdiction.

Respectfully submitted,

ALBERT R. CONNELLY,
Counsel for Respondent,
15 Broad Street,
New York 5, N. Y.

DONALD C. SWATLAND,
WILL FREEMAN,
Of Counsel.

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